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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,
PETITIONER,

v.

STATE OF CALIFORNIA,
RESPONDENT.

REPLY BRIEF BY PETITIONER FOR A WRIT OF CERTIORARI TO THE CALIFORNIA DISTRICT COURT OF APPEAL

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This reply brief will be limited to the points raised by respondent under Roman numeral I in its opposing brief. Petitioner will answer respondent's major arguments in the order in which they were made by respondent.

A) *Was the undercover agent's testimony "merely cumulative" or was it prejudicial?*

Respondent argues that the testimony of the undercover agent "was merely cumulative of evidence properly admitted so that its introduction was harmless beyond any reasonable doubt." (R.O.B.[1] 4). In support of this con-

[1] Respondent's Opposing Brief

tention, respondent catalogues much trial testimony to the effect that petitioner said that she had loved Hayton as recently as a few weeks or month *before* the alleged murder. But this fact—that petitioner had loved Hayton sometime *before* the alleged murder—was not essentially disputed. Petitioner's theory at the trial was that there came a time shortly before the alleged murder when she *stopped* loving Hayton. (R. 873, 935, 1783-88). Thus, the critical and much disputed issue was: did petitioner still love Hayton *at the time of* the alleged murder? The State offered one—and only one—piece of evidence on this issue: the testimony of the undercover agent that petitioner had admitted *after the alleged murder* that "she had always loved Mr. Hayton and *still loves him* . . . ." (R. 1100-01, emphasis added). Respondent does not, because it could not, allege that this testimony—that petitioner loved Hayton *at the time of* the alleged murder—was "merely cumulative." To the contrary, it was the only prosecution evidence offered on this critical and disputed issue; and it cannot, on any fair reading of the record, be deemed harmless. (See P.[2] 22-24).

Respondent trots out an argument rejected by this Court on numerous occasions: that "Appellant's statements to the undercover agent were not confessions . . . but were instead *merely admissions* . . . , and that their introduction "was not prejudicial *under California law.*" (R.O.B. 16, emphasis added). But as petitioner has pointed out (P. 17 n.10), the statements held inadmissible in *Massiah* v. *United States*, 337 U.S. 201, and *Escobedo* v. *Illinois*, 378 U.S. 478, were also "merely admissions" rather than confessions. And, of course, any reliance on what would be "prejudicial under California law" is entirely misplaced, since this Court has recently held that the California rule, here applied, was unconstitutional. Respondent concedes that the District Court of Appeal "did not express the rule of

[2] Petition for Certiorari

harmless error beyond a reasonable doubt in these terms," as required by *Chapman v. California,* 35 U.S.L. Week 4197 (1967). It lamely asserts, however, that the District Court of Appeal's opinion "was a remarkable example of prescience in light of this Honorable Court's recent decision in *Chapman* . . . ." But any fair reading of the record requires the conclusion that the federal standard of harmless error was not applied and could not have been met here.

B) *Did counsel for petitioner waive her constitutional objection for strategic reasons?*

Respondent concedes that counsel for petitioner "had raised the [*Escobedo* and *Massiah*] point in chambers before the undercover agent was called as a witness." (R.O.B. 11). Respondent seems to argue, however, that the point was not adequately preserved because defense counsel did not renew the objection in open court after the preliminary questions had been asked, and because he made "no attempt to have the testimony of the undercover agent stricken." (R.O.B. 12). Respondent claims that this action was a "deliberately chosen" waiver, evidencing a strategic willingness "to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied." (*Ibid.*) But as petitioner pointed out in her petition:

> "There is nothing in the record to support the view that [defense counsel] preferred to have Peggy Fisk's testimony admitted rather than excluded . . . . Indeed, if this were the case it would be extremely difficult to explain why he voiced his objection before her testimony. The most that can be said is that he may have preferred to have Peggy's testimony admitted rather

> than object in the presence of the jury after the preliminary questions."[3] (P. 12 n. 8)

Respondent appears to concede the unconstitutionality of any requirement that the objection must be renewed in the presence of the jury after the preliminary questions have been asked. Respondent claims, however, that

> "Under California law counsel for petitioner could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by petitioner to the undercover agent were voluntary and were not obtained in violation of petitioner's right to counsel." (R.O.B. 13)

But this is precisely what defense counsel attempted to do at the on-the-record proceeding in chambers. He objected to Peggy's testimony, but the trial judge ruled that "we would have to have her sworn and at least testify to the

[3] Petitioner further pointed out in her petition that "... the California requirement that counsel must renew his objection in the presence of the jury after the prosecution's preliminary questions had been asked and answered, forces defendants into an unconstitutional choice between foregoing their federal constitutional rights or making an objection which, if sustained, would inevitably leave in the jurors' minds the indelible impression that the suppressed evidence must have been damning indeed. The choice required of defense counsel by the California rule is particularly unfair in a case like the one at bar, where the unconstitutional testimony, though damaging to the defendant, is far less damaging than what the jury might imagine it to be. In this case, defense counsel would have had to make his objection in the presence of the jury after Peggy Fisk had stated that she had been petitioner's cellmate, that petitioner had made statements to her, and that she had never advised petitioner of her constitutional rights. A sustained objection at that point could not fail to leave the jury with the erroneous impression that petitioner had confessed to the crime. No legitimate state interest is served by requiring, in the context of a case like this, that an objection be renewed in the presence of the jury after preliminary questioning. See *Jackson* v. *Denno*, 378 U.S. 367, 378-88 (1964)." (P. 11-12).

preliminary questions anyway, and have an objection made at the proper time." (R. 1015). Petitioner's attorney disputed the judge's requirement that he must object in the presence of the jury, asserting: "You know that isn't right, Your Honor." But the Judge finally ruled that: "I don't see how it could be done *in the absence of the jury.*" (R. 1015, emphasis added). In light of this exchange, how can it be said that counsel for petitioner "made no such request" for a determination outside the hearing of the jury? What more could counsel do other than argue with the judge's ruling or futilely repeat his request? Accordingly, as petitioner has so clearly demonstrated (see P. 7-13), her conviction is reviewable by this Court.

C) *Were the statements testified to by the undercover agent elicited in a constitutional manner?*

Respondent has the temerity to argue that the "trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney" (53 Cal. Rptr. at 740) was entirely proper and not unconstitutional. It is difficult to believe that respondent is actually attempting to justify "the Peggy Fisk incident" as an entirely legitimate law enforcement technique under this Court's decision in *Lopez* v. *United States*, 373 U.S. 427.[4] Not even the California courts have attempted to justify this episode.

[4] Respondent cites *Lopez* v. *United States*, 373 U.S. 427, 438-39 for the following proposition: "It is well established that the authorities charged with law enforcement may place an agent in a cell so as to overhear incriminating statements on the part of an accused." There is not a single word in *Lopez* which lends any support to that proposition. The issue in that case concerned electronic recording; the conversation took place in an office, not a jail cell; and the defendant had not been arrested or charged with the crime at the time the recording was made.

Indeed, the District Court of Appeal condemned it in the clearest language as "completely indefensible," saying further that:

> "It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred." (53 Cal. Rptr. at 738).

Nor does the opinion of the California District Court of Appeal support respondent's claim that "there was no process of interrogation undertaken by the undercover agent and the statements were entirely spontaneous on the part of [petitioner]." (R.O.B. 15). To the contrary, the District Court of Appeal found the following: 1) the agent "did not tell defendant she was a law enforcement agent"; 2) she was placed in petitioner's cell for "the purpose of conversing with defendant in the obvious hope that defendant would make some statement helpful to the prosecution"; 3) she "showed defendant a newspaper clipping concerning the case to indicate to defendant that the press was 'ruining her' "; 4) "Under instructions, Peggy told defendant that she had overheard a conversation in the hall between four men whom she thought were from the District Attorney's office, in which one of them said, 'Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case' "; 5) "Peggy told defendant that she had talked to the sheriff and that they had discussed Peggy's getting 'a floater out of the State.' Peggy then said to defendant, 'I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same.' Peggy indicated that she had mistrusted her own attorney and indicated that perhaps defendant should mistrust hers." (P. A27-A31). The District Court of Appeal then concluded that this "trick" was "com-

pletely indefensible'' under *Massiah, Dorado,* and *Escobedo.* Statements elicited as a result of such a week-long process can hardly be characterized ''entirely spontaneous'' (R.O.B. 15). They are the product of a carefully planned and executed process of subtle interrogation and trickery. The incredible fact that the highest law enforcement officer of this nation's largest state *still* regards this episode as proper and constitutional is adequate evidence that it must be authoritatively condemned by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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